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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 383

LESTER H. BARNHART, CLINTON R. SMITH, GEORGE W. YONTZ, CHARLES S. LAKE, JAMES F. FUNK, WILLIAM J. GARVER, AND BURL R. PHARES, CONSTITUTING A COMMITTEE REPRESENTING AND ACTING FOR FEDERATED SHOP CRAFT EMPLOYES, MAINTENANCE OF WAY EMPLOYES, AND SIGNALMAN EMPLOYES, OF THE WESTERN MARYLAND RAILWAY COMPANY AND AUTHORIZED AND DIRECTED BY SAID EMPLOYES OF SAID RAILWAY COMPANY TO INSTITUTE THIS SUIT, *Petitioners*,

against

WESTERN MARYLAND RAILWAY COMPANY,
A BODY CORPORATE.

PETITION OF ABOVE-NAMED PETITIONERS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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against

WESTERN MARYLAND RAILWAY COMPANY,
A BODY CORPORATE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Lester H. Barnhart and the others above named, constituting a Committee representing and acting for Federated Shop Craft Employes, Maintenance of Way

Employes and Signalman Employes, of the Western Maryland Railway Company and authorized and directed by said Employes of said Railway Company to institute this suit, respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Fourth Circuit rendered and entered in the above-named cause on June 11, 1942, (R. 59), affirming the judgment and decree of the United States District Court for the District of Maryland, at Baltimore, entered in said cause by said District Court on November 28, 1941, that the Defendant's Motion to Dismiss the Plaintiffs' Bill of Complaint in said cause be granted and dismissing said Bill of Complaint with costs to be paid by the Plaintiffs.

A.

STATEMENT OF THE MATTER INVOLVED.

The case consists of the matters and facts alleged in the Bill of Complaint and the Exhibit filed as part of it. The Complaint and Exhibit show the following:

Interstate Railroads, including Defendant, were returned to private management by the Act of Congress, designated the "Transportation Act", by which the Railroad Labor Board, created by the Act, was directed to render decisions establishing rates of pay for shop craft and other classes of employes of the Interstate Carriers as just and reasonable, extending the National Agreement Rules until July 1, 1921, and ordering the Carriers and Employes to hold conferences as directed and required by the provisions of the Act and agree on as many rules as possible and submit such as were not agreed on to the Labor Board for decision; which the representatives of the defendant Railway Company and the Committee representing the Employes of the Company did accordingly. After rendering decisions respecting wage rates and pay of the Employes, the

Labor Board, on November 29, 1921, rendered its Addendum No. 6 to Decision No. 222, whereby the Board promulgated a complete set of rules to take the place of the rules of the National Agreement, and ordered them to be applied in the place of the rules disagreed upon and combined with the agreed rules so as to *form and constitute a working agreement as just and reasonable.* The Bill then specifically alleges that "THE DEFENDANT, THE WESTERN MARYLAND RAILWAY COMPANY, ACCEPTED THIS AGREEMENT, PRINTED IT AND PUT IT INTO EFFECT". (R. 4).

The Bill (R. 4) then alleges that pursuant to the provisions of the Labor Board's Decision 119, the defendant Railway Company and its Employes aforesaid ENTERED INTO CONTRACTS AND AGREEMENTS BETWEEN THE MANAGEMENT OF THE RAILWAY COMPANY AND ITS SAID EMPLOYES, INCLUDING THE PLAINTIFFS AND ALL THOSE FOR AND UPON WHOSE BEHALF THE BILL IS FILED, WHICH SAID CONTRACTS AND AGREEMENTS WERE KNOWN AND DESCRIBED AS "NEGOTIATIONS OF RULES AND WORKING CONDITIONS UNDER DECISION 119 OF THE UNITED STATES RAILWAY LABOR BOARD".

The Bill then (R. 4-5) recites, as *provisions of said Agreements, last above mentioned, Rule 37 thereof* as follows: "* * * *No employee shall be dismissed without a fair hearing as provided for in rule. The employe shall be apprised of the precise charge against him a reasonable time in advance of the hearing. Such employe shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his own choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him*"; and also Rule

183 thereof, as follows: *"These general and special rules and regulations shall remain in full force and effect until superseded or amended as herein provided: Should either the Railway Company or the Shop Crafts' Organization desire to revise these rules, a written statement containing proposed changes shall be given, and conference held within 30 days to arrange details necessary to negotiate to a conclusion."*

That (R. 5-6) *the defendant Company, in violation of said Contracts and Agreements last mentioned, on March 16, 1922, as later particularly stated, summarily, arbitrarily and illegally discharged and dismissed said Employes, without having complied with, or given any consideration or regard whatever to the terms, conditions and requirements of said Contracts and Agreements of employment, and more particularly said Rules 37 and 183 above recited, notwithstanding that said Employes were then, have always been, and are, ready and willing to perform the duties of their employments for the Defendant in full accordance with said Contracts and Agreements, and have heretofore tendered themselves as so ready and willing, and fully performed all the terms, conditions and agreements prescribed, provided for and agreed upon in said Contracts and Agreements between Defendant and Employes, and notwithstanding that said Plaintiffs and Employes, after said breach and violation by Defendant of said Contracts and Agreements, continuously offered said Defendant fully to perform and fulfil said Contracts and Agreements on their part, whilst the Defendant has continuously, wrongfully and unlawfully refused to permit Plaintiffs and said other Employes to perform their duties under said Contracts and Agreements and has prevented them from performing the same; that not any of the Plaintiffs or any of said Employes has or*

have ever been discharged or dismissed from the service or employment of Defendant in the manner agreed upon and stipulated expressly in said Contracts and Agreements of employment, and that Plaintiffs and said other Employes are still, and have continuously been, in the Defendant's employ, as its rightful and lawful Employes, and entitled to a fair and equitable accounting from the Defendant of and for the wages, benefits, emoluments and dues accruing to them, under their contractual relations with the Defendant, from, all and several, their rights, claims and privileges as Employes of the Defendant, and secured to them by, and incidental and appurtenant to, their said relation to the Defendant as its Employes as aforesaid.

The Bill then (R. 7-8) states the manner and particulars whereby the Defendant discharged said Employes, namely, *in violation of the Transportation Act of 1920, and the wage and rule decisions of the Labor Board*, the Company attempted to remove from the jurisdiction of the Board said Employes, who *"under Contracts with said Company"*, were performing work and service for it, by letting out to four several alleged "contractors" the operation of its railway shops.

The Bill (R. 8-9) then states that "said Employes made efforts to secure conference with the chief Executive of the Railway Company, but without success", and that after certain notices and correspondence, the whole dispute was duly brought and submitted to the Railroad Labor Board for decision.

The Bill (R. 9) then sets forth the Opinion and Decision No. 1361, of the Labor Board, rendered November 13, 1922, in disposing of the case submitted to it. (*It is respectfully submitted, at this point of the narrative of the allegations and contents of the Bill, that it must be perfectly manifest*

that the Decision and Opinion of the Labor Board, recited in the Bill, and filed as an Exhibit as part of the Bill, are not referred to or brought to the attention of the Court for the purpose, directly or indirectly, of asking the Court to enforce by process, or otherwise howsoever, said Decision of the Labor Board, but, on the contrary, in harmony and accord with the Decisions of the Supreme Court of the United States in the two Pennsylvania Railroad cases in 261 U. S. 72 and 267 U. S. 203, to show the facts and circumstances of the case herein, including the conduct and contentions of the respective parties, with reference to the Transportation Act of Congress of 1920, and the Contracts and Agreements actually entered into pursuant to said Act, *as well as with respect to the construction, operation and effect of said Transportation Act, as contended by the parties at the time, under and by virtue of which Act, and in compliance with, and pursuance of, its valid provisions, the said Contracts and Agreements were entered into by the parties.)*

The Bill (R. 9-10) states that, in its Opinion and Decision No. 1361, the Labor Board pointed out that the Employes submitted evidence that they had made an effort to secure conferences with representatives of the carrier, but that the carrier took the position that the men were no longer its employes, but were employes of the "contractors". The Board held that, under the Act the men were Employes of the carrier and subject to the Board's jurisdiction. The Board said:

> "The carrier contends it can close down its shops, put its employes under a contractor, arbitrarily reduce their legally established wages, and deprive them of the railway shop rules, *embraced in an Agreement of the parties and in the Decisions of the Board, although said wages and rules had previously been put into effect by the carrier, and the thirty-day notice pro-*

vided by the Agreement and the Transportation Act for negotiating changes in wages and working conditions had not been complied with."

The Board then continued:

"These contracts are merely *subterfuges* by which the carrier *arbitrarily* changed the wages and working conditions of these employes *without compliance with the provisions of the law* * * *. It must be remembered that these Decisions *had been accepted and put into effect by the carrier, and had thus, in effect, become Agreements between the parties, which could not be terminated except in accordance with the express provisions of the agreements themselves AS WELL AS THE TRANSPORTATION ACT, 1920.* * * *

The Railroad Labor Board, therefore, decided: (a) that the contracts between the Railway Company and the four alleged contractors were IN VIOLATION OF THE TRANSPORTATION ACT, 1920, and (b) that said employes were under the jurisdiction of the Board AND SUBJECT TO THE TRANSPORTATION ACT, 1920, *and the Decisions of the Board.*

The Bill (R. 11) states that the defendant Company refused to accept the Labor Board's Decision and continued to maintain and carry out its Contracts with said four Contractors, *and to hold and treat said employes as no longer employes of it, said Railway Company.*

Representatives of said employes continued from time to time to make efforts, but without avail, to obtain conferences with said Western Maryland Railway Company. Said Railway Company continued its attitude and conduct of refusing to recognize said Employes aforesaid as its Employes, and of refusing to recognize, carry out or give effect to any of the rights of said Employes under said Con-

tracts and Decisions, AND SAID ACT, with respect particularly to wages, working rules, *etc.* (R. 12).

Thereafter and during said year 1934, the Employes made further and written applications for conference with the executive officers and representatives of said Railway Company to adjust or dispose of said dispute, but all of such applications were refused and denied (R. 13).

On February 1, 1934, the Co-ordinator of Railroads of the United States ordered the said "contracts" of the Railway Company with said alleged "contractors" abolished as wrongful and illegal, and, accordingly, the same were abrogated and terminated.

On November 18, 1934, representatives of the Employes submitted the case with its controversies to the Railway Adjustment Board at Chicago, which replied it had no jurisdiction thereover; and in 1935 L. H. Barnhart, on behalf of said Employes, sought assistance and relief from the National Mediation Board at Washington, D. C., with reference to the case and controversy, which Board also disclaimed jurisdiction to afford remedial relief; and on September 26, 1940, W. J. Garver, another of the abovenamed Plaintiffs, wrote to the National Labor Relations Board at Washington, D. C., which Board forwarded said letter to the National Mediation Board, with respect to the status of the case and relief therein, to which the National Mediation Board, on October 9, 1940, replied it had no jurisdiction to deal with the matter. The Bill states that the Plaintiffs have exhausted every possible effort available to them to obtain relief and redress, for their injuries and wrongs resulting from the conduct and action of the Western Maryland Railway Company set forth in the premises, in all the tribunals of the United States Government other than their last and final right of resort for relief and redress in the Courts of the United States. (R. 13-14).

The Bill (R. 14) states, that the amount in controversy in this suit exceeds the sum or value of three thousand dollars ($3,000), exclusive of interests and costs, and the claims of some of the individuals for whom this suit is filed, and in controversy herein, exceed $3,000 exclusive of interests and costs.

The Bill (R. 15-16) then prays:

1. That the Court, by its Decree, adjudge that the Defendant Company, by its said conduct and actions, has unlawfully, wrongfully and unjustly violated its legal, equitable and moral obligations and duties to the Plaintiffs and other employes in whose behalf the suit is instituted.

2. That the Defendant Company may be *enjoined and restrained from continuing* its said conduct and actions against the Plaintiffs and said Employes.

3. That the Court may decree and direct an accounting to be made by said Railway Company to said Employes for all pecuniary and monetary losses suffered and sustained by them by the loss and denial to them of their *wages, earnings, emoluments, privileges, rights, relief, pensions, insurance and claims aforesaid, as Employes of said defendant Railway Company, from its violation of said Contracts and Agreements of employment on March 16, 1922, to the present time, and growing out of, or incidental or appurtenant to, their status and rights, in all respects, as Employes of said defendant Company,* and that for the purposes and effectuation of such accounting, the matter thereof may be referred to an Auditor of the Court with directions fully to examine into said matters aforesaid and to report thereon to the Court within a period commensurate and appropriate in the premises.

DEFENDANT'S MOTION TO DISMISS.

The Defendant moved to dismiss the action alleging (1) the Complaint fails to state a claim upon which relief can be granted; (2) the Court has no jurisdiction of the same; (3 and 4) the claims of the Plaintiffs and the cause or causes of action are barred by limitations as provided by Article 57, Section 1 of the Annotated Code of Maryland, 1939; (5) the claims of the Plaintiffs are barred by laches; (6) the alleged Agreements were unilateral and not based upon a sufficient consideration, and were unenforceable for want of mutuality, and there is no legally sufficient averment that they were for any fixed duration and not terminable at the will of either party. (R. 30).

The District Court, upon the Defendant's said Motion, dismissed the Complaint (R. 43), and the Circuit Court of Appeals affirmed the Judgment and Decree of the District Court. (R. 59).

B.

QUESTIONS PRESENTED.

First. Whether the District Court lacked jurisdiction of the subject-matter of the case?

Second. Whether the action has been barred by laches?

Third. Whether the action is one, as the Courts below cardinally held in denying jurisdiction, to enforce a decision or decisions of the United States Railroad Labor Board, or, in radical contradistinction from such supposed or ascribed object, is the suit one to prevent the unlawful and unconscionable abrogation and nullification by the defendant Railway Company of the contractual rights and properties of its Employes, the Plaintiffs, *prescribed by and growing out of the Act of Congress of 1920, known as the "Transportation Act"*, the true construction and effect

of which said federal Act the defendant interstate carrier denied, and further claimed the right to treat said Act as nugatory and ineffective as to it.

Fourth. Does the *repeal* of the Transportation Act, out of and under which the contracts and rights of the plaintiff Employes validly arose and existed, exclude and destroy the rights derived from that Act, as a basis for Federal jurisdiction, and particularly in the face of the undoubted fact, alleged in the Bill, that the attempt of the defendant carrier to dismiss the Plaintiffs as Employes was an illegal and wrongful subterfuge by the Defendant and an evasion and violation of the mandate, provisions and purpose of the Transportation Act, regulating interstate transportation and the relations of Carriers and Employes therein?

The Appellants respectfully and earnestly submit, in connection with the *Third* and *Fourth Questions* above stated, that the fact that the Decisions of the Labor Board were not enforceable by process is widely apart from the matter of the valid and binding operation of the Transportation Act in defining and describing the relations of interstate carriers and their employes, and of contracts actually entered into by such carriers with their employes, pursuant and obediently to the provisions, policy and purposes of the Act.

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The basic and cardinal question in this case is whether, upon the allegations of the Bill of Complaint and the Exhibit filed as part of it, the District Court had jurisdiction, that is, whether the Bill and Exhibit disclose a controversy arising under a law of the United States (28 U. S. C. A., Sec. 41 (1)). The decision and judgment

below were to the effect that the Complaint and Exhibit did not show a controversy arising under a law of the United States, and particularly the Transportation Act passed by Congress in 1920; and judicial authorities, supposed to sustain that conclusion, were cited as having that effect. The Petitioners respectfully submit that the dominant complaint, and the unmistakable and persistent purport, of the Bill of Complaint and the facts shown and made part of it by the Exhibit, disclose and press upon the Court a distinct and definite controversy radically growing out of the federal Transportation Act of 1920, and, as specifically giving rise to such controversy, the defendant Railway's wrongful violations of the requirements and purposes of said Act, and its, the Defendant's, repudiation, as a claimed right upon its part, of said Act, and of the contracts prescribed by it and, pursuant to the Act, entered into and actually put into operation by the Company and its Employes; *all* in nullification of the Act and deprivation of the property and personal rights provided by it and said contracts to the plaintiff Employes.

The Transportation Act of 1920, Ch. 7, 45 U. S. C. A., Sec. 132, required that—

> "It *shall be the duty* of *all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof.*"

This is a Statutory Mandate that "*it shall be the duty*" of the interstate Carrier and its officers "*to exert every reasonable effort*" and "*adopt every available means*" to "*avoid*" *any*, that is to say *all*, interruption to interstate commerce "growing out of any dispute between the car-

rier and its employees". Instead of obeying and carrying out that imperative command of the Act, the defendant Railway not only did *not adopt any available means,* or *exert any reasonable effort,* to avoid dispute with its employees and interruption to its operation, but, palpably to the contrary, by subterfuge, fraud and wrong, deliberately contrived, and wilfully and persistently perpetrated, a course of conduct, whereby it arbitrarily *created* a serious dispute with its employees, in derogation and violation of the federal Statute, and *claimed* it had the *lawful right* to do so. And to maintain that course of conduct and its said claim of right, the defendant Carrier specifically attempted to *get rid* of the Act, and to *nullify* its application to itself and its employees, by the "subterfuge" of falsely placing its own employees in the status of being the employees of a number of feigned contractors (to whom the Act did not apply), and thereby withdraw and eliminate itself and its employees from the application and provisions of the Act, which in the clear, positive terms applied to them both. The Carrier's wilful purpose and conduct were *not only to violate,* but, *as to itself, to annul, the Act.*

That the Bill of Complaint and the Exhibit as part of it charge that the Defendant's conduct, complained of therein, was its repudiation and violation of the Transportation Act of 1920 under a claim of right, and expressly and repeatedly show that the Transportation Act, and its construction, operation and effect, were basically and directly involved in the suit, plainly appear in the following allegations, among others, in the Bill and Exhibit:

Paragraph 3 of the Bill (R. 3-4) alleges that the interstate railroads, including Defendant, were returned to private ownership and management *by the Transportation Act of 1920;* that *"under said Act"* the Railroad Labor Board, created thereby, in the exercise of its lawful powers, etc.,

rendered the several decisions referred to in the Bill of Complaint, and ordered the carriers and the employes to hold conferences *"according to the provisions of said Transportation Act"*, and agree on as many rules as possible, and submit such as were not agreed on to the Board, etc.; that on November 29, 1921, the Board promulgated a complete set of rules to take the place of the rules in the National Agreement and ordered them to be applied so as to form and constitute a working agreement as just and reasonable; *that the defendant Railway Company accepted this Agreement, printed it and put it into effect* (R. 4).

Paragraph 4 of the Bill alleges that under Decision No. 119, which the Board rendered ("under said Act"), and pursuant to that Decision (and the Act), the Railway Company and the Employes entered into the Contracts and Agreements known as "Negotiations of Rules and Working Conditions under Decision 119 of the United States Railroad Labor Board"—a plain allegation that the carrier and the employes, both subject to the Act of 1920, accepted said Decision 119 and the Contracts and Agreements prescribed by it, as intended and provided by the Act. Facts shown by the Exhibit are particularly to the same effect. *Infra.*

After setting forth, in Paragraph 6, the Defendant's arbitrary and illegal discharge of its Employes, in violation of the rules agreed upon under the Act, the Bill of Complaint, Paragraph 7, describing the manner and particulars of such discharge of the Employes, makes the highly important and pertinent allegation that "THE SAID RAILROAD COMPANY IN VIOLATION OF SAID TRANSPORTATION ACT OF 1920, and of the Wage and Rule Decisions of the Labor Board, undertook to remove FROM THE JURISDICTION OF THE BOARD ITS SAID EMPLOYES AFORESAID, WHO, UNDER

CONTRACTS WITH SAID COMPANY, WERE PERFORMING WORK AND SERVICE FOR IT, BY LETTING OUT TO ALLEGED 'CONTRACTORS' THE OPERATION OF ITS RAILWAY SHOPS." The Bill of Complaint then alleges that a Committee of the Employes sent to each of the four alleged Contractors demands to put into effect the rates of pay, rules and working conditions which the Railroad Company had agreed to with them, and, moreover, that the President of the Railway Employes' Department notified the Labor Board that a strike would be called on March 25, which was called on that date, "UPON THE GROUND, DEFINITELY AVOWED AT THE TIME, THAT SAID FOUR CONTRACTS WERE ENTERED INTO BY SAID RAILWAY COMPANY WITH SAID ALLEGED CONTRACTORS TO EVADE COMPLIANCE WITH THE PROVISIONS OF THE TRANSPORTATION ACT OF 1920 AND THE RULES AND WAGE DECISIONS OF SAID LABOR BOARD". (R. 9).

The dispute, growing out of and based upon the charge and complaint that the Railway's four Contracts with said alleged Contractors were entered into by it *to evade the provisions of the Transportation Act of 1920,* was then submitted to the Board, which, unquestionably, was done under and in accordance with the Transportation Act of 1920.

The Bill notably at this point (R. 10) alleges that the Board stated with particularity the positions and contentions of the Carrier, particularly asking the attention of the Court thereto, and proceeds to allege that the Board *thereupon explicitly defined the question which constituted the issue* between the Carrier and the Employes, thus: "The Carrier contends it can close its shops, put its Employes under a contractor, arbitrarily reduce their legally established wages, and deprive them of the Railway Shop

Rules, embraced in an Agreement of the parties and in the Decisions of the Board, although said wages and rules had previously been put into effect by the Carrier, and the thirty-day notice provided by the Agreement AND THE TRANSPORTATION ACT for negotiating changes in wages and working conditions had not been complied with".

The Board then continued, as the Bill particularly alleges, that "These Contracts are merely subterfuges by which the Carrier arbitrarily changed the wages and working conditions of these Employes without compliance with THE PROVISIONS OF THE LAW" (i. e. The Transportation Act).

And the Bill further states that the Board further said, "It must be remembered that these Decisions (of the Board embodying the wages and rules taken away by the Carrier from these Employes) had been accepted and put into effect by the Carrier, and had thus, in effect, become Agreements between the parties, which could not be terminated except in accordance with the express provisions of the Agreements themselves AS WELL AS THE TRANSPORTATION ACT, 1920." (R. 10).

The Bill then recites that the Board concluded (a) that the Contracts between the Railway Company and the four alleged Contractors were IN VIOLATION OF THE TRANSPORTATION ACT OF 1920, etc., and (b) that said Employes were under the jurisdiction of the Board AND SUBJECT TO THE TRANSPORTATION ACT OF 1920. (R. 10-11).

Plainly, all the said allegations of illegal and unconscionable conduct charged by the Bill against the defendant Railway Company relate and refer to the *Transportation Act of 1920.*

THE EXHIBIT FILED AS PART OF THE BILL.

The matters and facts appearing in the *Exhibit*, as part of the Bill, are equally express and cumulative as showing that the whole essential dispute herein between the Plaintiff Employes and the Defendant Carrier originated and consists in a claim, asserted and maintained, as of right, upon the part of the Railway Company, and a counter claim upon the part of the Employes, directly involving the application, meaning and effect of the Transportation Act of 1920. The Board defined the identical controversy, submitted to it, with precise exactitude, as follows:

> "Question: Are the Contracts which the Western Maryland Railway Company has let for the operation of its railway shops IN VIOLATION OF THE TRANSPORTATION ACT, 1920, and of the Wage and Rule Decisions of the Labor Board, and do said Contracts REMOVE FROM THE JURISDICTION OF THE BOARD THE EMPLOYES who, under said Contracts, are performing service for the carrier?" (R. 16-17).

Next, the Exhibit shows that the chief Executive of the Railway Company wired the Labor Board, March 26, 1922, "Your wire 24th: Western Maryland Railway Company HAS NOT VIOLATED TRANSPORTATION ACT, or orders of Labor Board." (R. 18).

In taking jurisdiction of the controversy, the Board declared "THE BOARD, THEREFORE, UNDER THE AUTHORITY CONFERRED UPON IT BY THE TRANSPORTATION ACT, ASSUMES JURISDICTION OF SAID DISPUTES AND SETS THEM FOR HEARING MONDAY, JUNE 26, 1922". (R. 18).

The Exhibit then shows that the President of the Railway Employes Department (Federated Shop Crafts), by letter, dated March 23, 1922, notified the Labor Board that the strike had been called because "Said Contracts were

entered into to evade compliance with the provisions of the TRANSPORTATION ACT, 1920, and the rules and wage Decisions of the Labor Board". (R. 21).

The Exhibit then (R. 23-24) shows that the Labor Board, in its Opinion upon the controversy, declared

> "The Labor Board has already decided the first question thus raised by the carrier by holding in numerous cases that the employees in a railway shop operated under such a contract are, *within the contemplation of the TRANSPORTATION ACT, 1920,* employees of the carrier and subject to the jurisdiction of the board.
>
> "The carrier contends that it can close down its shops, put its employees under a contractor, arbitrarily reduce their *legally established wages, and deprive them of the railway shop rules embraced in an agreement of the parties and in the decisions of the Board, although* SAID WAGES AND RULES HAD PREVIOUSLY BEEN PUT INTO EFFECT BY THE CARRIER, AND THE 30-day NOTICE PROVIDED BY THE AGREEMENT AND THE REQUIREMENTS PROVIDED BY CONGRESS IN THE TRANSPORTATION ACT FOR NEGOTIATING SUCH CHANGES IN WAGES AND WORKING CONDITIONS HAD NOT BEEN COMPLIED WITH."
>
> "These contracts were merely subterfuges by which the carrier arbitrarily changed the wages and working conditions of these employees *without compliance* WITH THE PROVISIONS OF THE LAW. If it be said that the decisions of the board, embodying the wages and rules taken away from these employees, were not legally binding on the carrier, IT MUST BE REMEMBERED THAT THESE DECISIONS HAD BEEN ACCEPTED AND PUT INTO EFFECT BY THE CARRIER AND HAD THUS, IN EFFECT, BECOME AGREEMENTS BETWEEN THE PARTIES, WHICH COULD NOT BE TERMINATED EXCEPT IN ACCORDANCE WITH THE EXPRESS PROVI-

SIONS OF THE AGREEMENTS THEMSELVES *AS WELL AS THE TRANSPORTATION ACT, 1920.* * * *

"In this case, however, the carrier had taken steps which purported to close its shops, transfer its employees to a new employer, remove them from the application OF THE TRANSPORTATION ACT, 1920, and obliterate their wage and rule agreements. This was equivalent to a lockout. THIS WAS DONE UNDER A CLAIM OF LEGAL RIGHT." (R. 24-25).

In its Decision, the Labor Board declared (R. 25):

"(a) That the several contracts entered into between the Western Maryland Railway Co., George E. Fowble, Charles J. Wolfe, William K. Hossack, and the Dickson Construction & Repair Co., for the operation of its railroad shops and the performance of certain work enumerated in said contracts, ARE IN VIOLATION OF THE TRANSPORTATION ACT, 1920, IN SO FAR AS THEY PURPORT OR ARE CONSTRUED BY THE CARRIER TO REMOVE SAID EMPLOYEES FROM THE APPLICATION OF SAID ACT, AND THAT THOSE PROVISIONS OF THE CONTRACTS AFFECTING THE WAGES AND WORKING RULES OF SAID EMPLOYEES ARE IN VIOLATION OF DECISIONS Nos. 2, 119, and 147 OF THE RAILROAD LABOR BOARD.

"(b) THAT THE SHOP EMPLOYEES OF SAID CONTRACTOR ARE UNDER THE JURISDICTION OF THE LABOR BOARD AND SUBJECT TO THE APPLICATION OF THE TRANSPORTATION ACT, 1920, and decisions of the Labor Board."

In the light of the above numerous and definite allegations of the Bill of Complaint and the facts set forth in the Exhibit, it would seem impossible to justify the fundamental conclusion of the Court below, in its denial of jurisdiction, that the Bill of Complaint and Exhibit do not disclose a controversy arising under a law of the United States, or to discover any application of the authorities

and decisions cited in the Opinion of the Court below to establish the absence of jurisdiction in view of said allegations of the Bill and Exhibit, which *demonstrate*, beyond question, an avowed and glaring controversy arising under the Transportation Act of 1920.

Upon such allegations, the decisions of this honorable Court clearly and abundantly sustain the jurisdiction of the Court in this case; and the decision of the Court below, upon the question of jurisdiction, is in conflict with and contravention of those decisions.

Thus—

In *Louisville & Nashville R. R. Co. v. Rice*, 247 U. S. 201, the Supreme Court said:

> " 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress'. *Tennessee v. Davis*, 100 U. S. 257, 264. 'Whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations.' *Central R. R. Co. of New Jersey v. Mills*, 113 U. S. 249, 257. 'If the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction, whether the claim ultimately be held good or bad.' *The Fair v. Kobler Die Co.*, 228 U. S. 22, 25. A suit arises under an act of Congress when 'it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.' *Shultis v. McDougal*, 225 U. S. 561, 569. As to interstate shipments 'there can be no question that, since the decision in the *Croninger Case* (226 U. S. 491), the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligations.' *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U. S. 592, 595; *Louisville & Nashville R. R. Co. v. Maxwell*, 237 U. S. 94, 97."

A court of the United States has original jurisdiction over all cases where a United States law, whether constitutional or congressional, is involved. *Leonard v. City of Shreveport* (C. C. La., 1886) 28 F. 257.

A suit is within the jurisdiction of the District Court as a controversy arising under the laws of the United States, where the right and title set up by the plaintiff depend upon the construction of an act of Congress. *King County v. Seattle School Dist.*, 263 U. S. 361, 68 L. Ed. 339.

Where some title, right, privilege, or immunity on which a recovery depends will be defeated by one construction or sustained by opposite construction of Congressional legislation, the case arises under the laws of the United States within this section. *Starin v. New York*, 115 U. S. 248, 29 L. Ed. 388.

To the same effect are:

Cooke v. Avery, 147 U. S. 375, 37 L. Ed. 209.
Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 47 L. Ed. 575.
In re Lennon, 166 U. S. 548, 41 L. Ed. 1110.

An action to enforce a right, the existence of which *depends* upon an Act of Congress, *necessarily involves the construction and application of the federal statute*, and is within the jurisdiction of the federal courts. *Calhoun v Central of Georgia R. Co.* (1910), 7 Ga. App. 528, 67 S. E. 274.

See also:

First National Bank v. Williams, 252 U. S. 504, 64 L. Ed. 690.
Locking v. Detroit, etc., Navig. Co., 273 Fed. 577; 284 Fed. 497; 261 U. S. 618, 67 L. Ed. 830; 265 U. S. 346, 68 L. Ed. 1047.
U. S. v. McNeil & Sons, 267 U. S. 302; 307.

Smith v. Kansas City Title & Tr. Co., 255 U. S. 180, 65 L. Ed. 577.
Hart v. Keith Exchange, 262 U. S. 271, 273.
Mayo v. Lakeland, etc., Co., 309 U. S. 310, 318; 84 L. Ed. 774, 780.
Gibbs v. Buck, 307 U. S. 66; 83 L. Ed. 1111.
Utah Fuel Co. v. National, etc., Coal Comm., 306 U. S. 56, 60; 83 L. Ed. 483, 487.
Shields v. Utah, etc., R. Co., 305 U. S. 177, 183; 83 L. Ed. 111, 116.
Cound v. Atchison, T. & S. F. Ry. Co., 173 F. 527.
25 Corpus Juris, Federal Courts, Sec. 32, pp. 726-727; also Sec. 37, p. 729, note 35, pp. 729-730.
Rose, Federal Jurisdiction and Procedure (3rd ed.) Secs. 234, 249.

Accordingly, it is respectfully submitted, the Writ of Certiorari is preeminently called for in this case because the decision of the Court below upon the allegations of the Bill and Exhibit are not only not in accord, but *in conflict*, with the applicable decisions of this Court; and because the Court below decided an important question of general law in a way untenable and in conflict with the weight of authority; and, particularly, decided a *federal question of cardinal importance* in a way in conflict with applicable decisions of this Court.

The learned Court below apparently fell into the error of holding that the *repeal* of the Transportation Act of 1920 precluded and prevented any controversy from arising under that law involving rights and interests created by the Act prior to its repeal. For illustration, in the Opinion it is stated with reference to the Transportation Act of 1920 creating the Railroad Labor Board, "This Board, as created by the Act of 1920, was legislated out of existence by the Railway Labor Act of May 20, 1926. New legislation has since been enacted controlling the subject, etc." (R. 52).

This position is untenable. The authorities are unanimous, and exceedingly numerous, that the repeal of the federal Act of 1920 did not destroy or divest the personal and property rights of the plaintiff Employes validly created and existing by virtue of and in accordance with the provisions of the repealed statute. Such valid and vested rights could not be constitutionally or legally destroyed by such repeal, but could be terminated only in accordance with the provisions of the special contracts whereby they were legally created by virtue of and pursuant to the said Act of Congress. So that the personal and property rights of the Employes herein involved are as fully and directly referable now to federal Act of 1920 and the Contracts which created them under the authority and provisions of that Act, as they were when they originally came into existence under and by virtue of the Act. *See the list of authorities cited in the Brief, Argument, Point II, to the effect that the repeal of a statute does not and cannot destroy rights created and existing under and pursuant to such statute.*

2. The effect of the opinion and judgment of the Circuit Court of Appeals is to maintain the legality of, and immunity from responsibility for, the *abrogation* by the defendant Company of a Federal Statute and of Contracts prescribed by, and entered into under, said Statute for the protection of the public interests involved in interstate commerce. The judgment of the Court below, in that aspect, it is respectfully submitted, calls for a review thereof by this Court by Writ of Certiorari.

3. The Circuit Court of Appeals for the Fourth Circuit held that the suit, embodied in the Bill of Complaint and Exhibit, "was *truly one in equity* seeking, among other things, an injunction, an accounting, and a determination of appellants' status or relationship, with a complexus of

all the rights and privileges thereunto appertaining—such as wages, seniority, relief and pension". Nevertheless, the learned Court below, despite the positive allegations, repeatedly appearing throughout the Bill of Complaint and Exhibit, of unconscionable wrong-doing and misconduct, in violation of both law and morals, upon the part of the Defendant and Appellee, and out of which the grievances and injuries of the Plaintiffs and Appellants originated and continued, applied the *equitable* defense of *laches* to defeat the claim and right of the Employes to the equitable remedies and redress they prayed.

The equitable defense of laches is not available in a court of conscience to a wrong-doer wilfully and persistently guilty of the inequitable, blameworthy and unrighteous conduct which the allegations of the Bill and Exhibit, admitted upon Motion to Dismiss, definitely charge the Defendant with having deliberately committed. As shown in the Brief in support of this Petition, the decisions of this Court, of the high English Courts, and of Courts of last resort in the several States, as well as the authoritative treatises upon equity jurisprudence, sustain the sound equitable doctrine, above stated, that, in suits in equity, the defense of laches is not available in furtherance of wrongdoing and injustice, or to shield and uphold the wrongdoer who has perpetrated the injuries complained of.

It is respectfully submitted that the judgment of the learned Court below that the complaint and suit were barred by laches and, therefore, should be dismissed, is in disregard of and conflict with the applicable decisions of this Court, and of the general weight of authority upon the subject, and appropriately calls for the Writ of Certiorari for the review of said judgment by this honorable Court. See the Authorities in the Brief, Point IV, *infra*.

WHEREFORE, your Petitioners respectfully pray that the Writ of Certiorari be issued out of and under the seal of this honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a certain day to be named therein, a full and complete Transcript of the Record and of all proceedings in case numbered on its Docket No. 4918, and entitled as above shown, and that said judgment of said Circuit Court of Appeals for the Fourth Circuit in and respecting said case may be reversed by this honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

And your Petitioners will ever pray, etc.

ISAAC LOBE STRAUS,

Counsel for Petitioners.

Dated September 8, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.....

LESTER H. BARNHART, CLINTON R. SMITH, GEORGE W. YONTZ, CHARLES S. LAKE, JAMES F. FUNK, WILLIAM J. GARVER, AND BURL R. PHARES, CONSTITUTING A COMMITTEE REPRESENTING AND ACTING FOR FEDERATED SHOP CRAFT EMPLOYES, MAINTENANCE OF WAY EMPLOYES, AND SIGNALMAN EMPLOYES, OF THE WESTERN MARYLAND RAILWAY COMPANY AND AUTHORIZED AND DIRECTED BY SAID EMPLOYES OF SAID RAILWAY COMPANY TO INSTITUTE THIS SUIT, *Petitioners,*

against

WESTERN MARYLAND RAILWAY COMPANY,
A BODY CORPORATE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The Opinion of the United States Circuit Court of Appeals for the Fourth Circuit has been reported in 128 Federal Reporter, Second Series, at pages 709 to 716, August

10, 1942. The Opinion of that Court was filed by it on June 11, 1942, and is in the Record beginning at page 47. The Opinion of U. S. District Court for Maryland was filed November 19, 1941, and is in the Record at pages 30 to 42.

II.

JURISDICTION.

Petitioners seek a review by Certiorari pursuant to Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. C., Tit. 28, Sec. 347 (a)). The date of the decision sought to be reviewed is June 11, 1942 (R. 59). It was entered by the United States Circuit Court of Appeals for the Fourth Circuit affirming a Judgment and Decree in said case rendered and entered by the United States District Court for the District of Maryland, November 28, 1941, at Baltimore, Maryland.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A, supplemented under heading C, in the Petition for the Writ of Certiorari, and, for brevity, said statement and supplement are not repeated here.

IV.

STATUTE INVOLVED.

The Act of Congress, designated The United States Transportation Act of 1920, approved February 28, 1920. (45 U. S. C. A., ss. 131-146).

V.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in deciding that the Bill of Complaint and the Exhibit fail to show jurisdiction in the United States District Court.

(2) The Circuit Court of Appeals erred in deciding that the action or suit set forth in the Bill of Complaint was barred by laches.

(3) The Circuit Court of Appeals erred in holding and deciding that the said suit or action was one to *enforce a decision* of the United States Labor Board under said Transportation Act of 1920.

(4) The Circuit Court of Appeals erred in holding and deciding that the *repeal* in 1926 of said Transportation Act of 1920 precluded and destroyed the rights of the Plaintiffs and Appellants, Petitioners here, derived from that Act, as a basis of and for Federal jurisdiction.

(5) The Court of Appeals erred in failing to hold that the fact that the decisions of the Labor Board were not enforceable by process is wholly apart from and does not affect the valid and binding operation of the Transportation Act of 1920 itself in defining and ascertaining the respective duties of interstate carriers and their employes, and of contracts actually entered into and put into operation by such carriers with their employes, pursuant and obediently to the directions, provisions, and purposes of the Act.

(6) The Court of Appeals erred in maintaining, by its Opinion and Judgment, the legality of, and immunity from responsibility for, the abrogation by the defendant Company of a Federal Statute and of contracts prescribed by,

and entered into under, said Federal Statute, the Transportation Act of 1920, for the protection of the public interests involved in interstate commerce.

VI.

ARGUMENT.

POINT I.

THE DISTRICT COURT DID NOT LACK JURISDICTION OF THE SUIT. ON THE CONTRARY, THAT COURT, UPON THE ALLEGATIONS OF THE BILL OF COMPLAINT, HAD JURISDICTION BY VIRTUE OF ARTICLE I, SECTION 8, OF THE U. S. CONSTITUTION, EMPOWERING CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES, AND THE TRANSPORTATION ACT OF 1920 ENACTED IN THE EXECUTION OF THAT POWER, AND THE CONTRACTS AND AGREEMENTS, EXECUTED AND PUT IN OPERATION PURSUANT TO THAT ACT, BETWEEN THE COMPANY AND ITS EMPLOYES, AND BY THE ALLEGATIONS IN THE BILL OF THE DEFENDANT RAILWAY'S WRONGFUL VIOLATIONS, CONTINUED WITHOUT INTERMISSION, OF SAID ACT OF CONGRESS AND SAID CONTRACTS, AND ITS REPUDIATION, AS A CLAIMED RIGHT UPON ITS PART, OF SAID ACT AND CONTRACTS, IN DENIAL AND DEPRIVATION OF THE PROPERTY AND PERSONAL RIGHTS SECURED TO THE PLAINTIFF EMPLOYES BY VIRTUE OF SAID ACT AND CONTRACTS.

This subject has been amply discussed, and the authorities referred to, in Paragraph 1 of the Division of the Petition for Certiorari under the caption REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT, pages 11-23, which for brevity is not repeated here. *See the Authorities there collated.*

To that discussion it may here appropriately be added that the Transportation Act of 1920, which, as explicitly shown in the Bill of Complaint and the Exhibit, the defendant carrier claimed it could rightfully and lawfully repudiate and nullify, certainly did not contemplate that the contracts it prescribed for the maintenance and protection of

interstate commerce, and, as the Supreme Court declared, "in the highest public interest", should be annulled as mere "scraps of paper" by the carrier who had entered into them. Any such right upon the part of the carrier would be not only an evasion, but the destruction, of the Statute. The assertion of such a right, and persistence therein, are tantamount to an absolute claim, upon the carrier's part, that the Act itself authorized such conduct. *That is the cardinal and clear-cut issue presented by the Bill of Complaint.* The carrier claimed, and acted accordingly, that the Act was ineffective and nugatory. The Appellants, the Employes, maintained that the Act was validly operative upon themselves and their interstate employer, and that when the latter entered into a contract with them, pursuant to the Act, and effectuated it by actual operation, the rights of the employes originating in and derived from the Act were protected and secured by both the Act and the contract until terminated according to the provisions of both.

The point is impressively illustrated by what actually happened. The Act and contract springing from it established certain relations between the interstate carrier and its employes. As long as the *employes remained such*, the carrier was bound by the Act, because the Act operated upon both the employes and the carrier employer. As the Bill of Complaint and the Exhibit show, the carrier realized that condition, and, in order to escape its obligations under the Act and under the contract it had made by virtue of the Act, it improvised the expedient of making the employes not *its* employes, but the employes of contractors not under and not within or affected by the Act. The defendant company did this by *just that subterfuge* in evasion and violation of the Statute and of the contracts thereunder which it had made and was carrying into effect with its employes. This subterfuge is set out in detail in

the Bill and Exhibit. It was done, necessarily, under a *claim of right to do so,* that is to say, a claim that the Statute, in its construction and effect, did not prevent such action, but, on the contrary, authorized its own repudiation and annulment in that manner. *Then and there arose the question whether the Statute was to be construed and disposed of in accordance with the carrier's said claim as to its nature, meaning and effect. That was the question* considered by the Labor Board, in the case between the employes and the carrier in the summer of 1922, and in its opinion of November 13, 1922, wherein the contentions of both parties are stated and discussed. Although the *Decision* of the Board was not enforceable by process, it distinctly defined and illustrated the controversy as a claim upon the carrier's part that it could proceed with respect to the Act as it did, and so lawfully exempt itself and its employes from the Act.

In *Hoey v. New Orleans, etc. R. Co.,* 105 So. 310, 311-312, and 159 La. 258, 263-264, the Supreme Court of Louisiana, after holding, under the Supreme Court Decision in *Pa. R. Co. v. U. S. Labor Board,* 261 U. S. 72, that the decisions of the U. S. Railroad Labor Board under the Act of 1920 were not enforceable by process, expressly decided that where the defendant railroad *elected to accept* a decision of the Railroad Labor Board, and reinstate a discharged employe and pay him for time lost, the decision and contract so accepted became valid and effective and the employe was entitled to recover such amount as he could show was due him under the contract. The Court quoted the statement of Mr. Chief Justice Taft, in the case in 261 U. S. 72, that, "The Board is to act as a Board of Arbitration." And the Court continued:

> "The defendant Company had the right to reject or accept the award of the Labor Board. It elected to

accept it. In doing so, it was obviously aware of the pecuniary and other material benefits it could secure from such action. The publication of the Board's decision and defendant's refusal to abide thereby were forestalled by its notification to the plaintiff of its acquiescence therein. The good will of the public was retained, with the consequent retention, and possible increase, of its business and earnings. Its rejection of the decision would have had the opposite effect. The public would have looked upon the railroad Company as a corporation willing to incur and encourage disputes with its employes, rather than as one desirous of cooperating with them in the interest of the public business. Having the ill will of the public, defendant's business would decrease, and its receipts, and consequent earnings, would necessarily diminish. On the other hand, the plaintiff was, by the defendant's notification of its desire to comply with the Board's decision, misled, to his detriment, to forego the immediate exercise of his *legal right* to require the publication by the Labor Board of its decision and the failure of the defendant Company to comply therewith. In these circumstances, we think the defendant company has ratified and acquiesced in, and is *equitably* estopped from contesting, the award of the Board."

See also:

Rhodes v. New Orleans, etc., R. Co., 129 Miss. 78, 94-96; 91 So. 281, 283-284.

Point II.

THE REPEAL OF THE FEDERAL ACT OF 1920 DID NOT DESTROY OR DIVEST THE PERSONAL AND PROPERTY RIGHTS OF THE PLAINTIFF EMPLOYES CREATED AND EXISTING BY VIRTUE OF AND IN ACCORDANCE WITH THE PROVISIONS OF THE REPEALED STATUTE. SUCH VALID AND VESTED RIGHTS COULD NOT BE CONSTITUTIONALLY OR LEGALLY DESTROYED BY SUCH REPEAL, BUT COULD BE TERMINATED ONLY IN ACCORDANCE WITH THE PROVISIONS OF THE CONTRACTS WHEREBY THEY WERE LEGALLY CREATED BY VIRTUE OF AND PURSUANT TO THE SAID ACT OF CONGRESS. SO THAT THE PERSONAL AND PROPERTY RIGHTS OF THE EMPLOYES HEREIN INVOLVED ARE AS FULLY AND DIRECTLY REFERABLE NOW TO THE CONTRACTS WHICH CREATED THEM AND THE ACT OF 1920 WHICH AUTHORIZED AND PROVIDED FOR THEM AS THEY WERE WHEN THEY ORIGINALLY CAME INTO EXISTENCE UNDER AND BY VIRTUE OF THE ACT OF 1920.

A pervading Error of the learned Court below, in its denial of its jurisdiction of the case made by the Bill of Complaint, consists in the wholly unwarranted and untenable assumption that the *repeal* of the Federal Act of 1920 *divested and destroyed* the personal and property rights of the Appellants created and subsisting by virtue of that Act.

Repeal of the Transportation Act, it is respectfully submitted, *did not* destroy or divest said rights of the Appellants which lawfully came into existence and became vested by virtue of the provisions of that Federal Statute, and could not, constitutionally, have divested or destroyed said rights.

Peninsula Produce Exchange v. N. Y. P. and N. R. Co., 152 Md. 594; 595; 596. (Note citation of Federal Authorities in this case).

Jevons v. Pittman, 126 Md. 650; 653.

Vandiver, Treasurer, v. Fidelity Savings Bank, 120 Md. 619; 624; authorities there cited.

U. S. v. Carolina Frght. Carriers Corp., decided by U. S. Supreme Ct. Mar. 2, 1942, 315 U. S. 475, 486-488; 86 L. Ed. pp. 627, 634-635, Headnotes 7 and 8.

Wood v. Lovett, 313 U. S. 362, 369; 85 L. Ed. 1404, 1407.

Appelby v. N. Y., 271 U. S. 364; 70 L. Ed. 992.

Morgan's La. & Tex. Co. v. Cocke, 273 U. S. 656 (cited 152 Md. 596) and Authorities there cited.

Danzer Co. v. Gulf, etc., R. Co., 268 U. S. 633 (cited 152 Md. 596) and Authorities on page 637.

Phillips v. Grand Truck Ry. Co., 236 U. S. 662; 667 (cited 152 Md. 569).

Consolidated Edison Co. & I. B. E. W. v. National Labor Relations Board, 305 U. S. 197; 83 L. Ed. 143, 144, 145.

Houston & Tr. Co. v. Texas, 147 U. S. 243, 261; 42 L. Ed. 1023, 1029.

Noble v. Union River, etc., R. Co., 147 U. S. 165, 176; 37 L. Ed. 123, 127.

Reese v. Watertown, 19 Wallace 120-124; 22 L. Ed. 72, 76-77.

Hoffman v. Quincy, 4 Wallace 535; 19 L. Ed. 403.

Union Pacific R. Co. v. U. S. (sinking fund cases), 99 U. S. 718; 25 L. Ed. 501.

Hepburn v. Griswold, 8 Wallace 603, 624; 19 L. Ed. 513, 526.

Wolff Packing Co. v. Ct. of Ind. Rel., 267 U. S. 552, 563, 566, 569; 69 L. Ed. 785.

Int. Comm. Comm. v. Louisville & N. R. Co., 227 U. S. 88, 91.

Morgan v. U. S., 298 U. S. 468; 304 U. S. 1.

Green v. Biddle, 8 Wheaton 1; 5 L. Ed. 547.

La., ex rel. Ranger v. New Orleans, 102 U. S. 203; 26 L. Ed. 132.

La., ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716; 28 L. Ed. 574.

These decisions, it is respectfully submitted, demonstrate the error of the assumption that *there is not involved in this litigation any Act of Congress because the Transportation Act has long since been repealed and new legislation has been enacted covering the subject.*

The authoritative Treatises accord with the Judicial Decisions above cited to the effect that the repeal of a statute does not and cannot destroy or divest valuable rights created, vested and existing under and pursuant to such statute.

> *Cooley's Constitutional Limitations*, 8th ed., Vol. 2, pp. 744-745.
> *Lewis' Sutherland Statutory Construction*, Sec. 646; 641, *et seq.*
> 59 *Corpus Juris, Statutes*, Sec. 696, p. 1171.
> 12 *Corpus Juris, Constitutional Law*, Sec. 781, p. 1086; and see particularly Sec. 487, p. 957.

> "The fifth amendment to the Constitution of the United States which provides that no person shall be deprived of life, liberty or property without due process of law, secures the individual against any action of the Federal Government divesting vested rights."
>
> 12 *Corpus Juris, Constitutional Law*, Sec. 487, p. 957.

Point III.

THE ACTION HEREIN IS NOT A SUIT TO ENFORCE A DECISION OF THE UNITED STATES LABOR BOARD UNDER THE TRANSPORTATION ACT, BUT IS A SUIT DIFFERING, RADICALLY AND THROUGHOUT, FROM A PROCEEDING TO ENFORCE ANY SUCH DECISION; AND THE DECISION OF THE LABOR BOARD, WHICH THE DISTRICT COURT ERRONEOUSLY SUPPOSED IT WAS ASKED TO ENFORCE, IS REFERRED TO AND DETAILED IN THE BILL AND THE EXHIBIT FOR THE SOLE, BUT HIGHLY MATERIAL, PURPOSE OF SHOWING THE FACTS ATTENDING AND CHARACTERIZING THE RAILWAY COMPANY'S REPUDIATION OF THE TRANSPORTATION ACT, ITS CONTRACT WITH ITS EMPLOYES UNDER THAT ACT, THE DISINGENUOUS CHARACTER OF ITS EVASION AND VIOLATION OF THE FEDERAL LAW AND ITS CONTRACTS THEREUNDER, THE SUBTERFUGES WHEREBY IT ACCOMPLISHED THOSE ENDS, AND ITS POSITION AND CONTENTIONS PURPORTING TO JUSTIFY ITS WRONGFUL VIOLATIONS OF THE FEDERAL LAW AND OF THE CONTRACTUAL DUTIES WHICH, AS AN INTERSTATE CARRIER, THE DEFENDANT ASSUMED UNDER IT.

The learned Court below, in denying jurisdiction, held that the action was one to *enforce a decision* of the United States Labor Board. This, it is respectfully submitted, was an entirely erroneous supposition as to the object and prayers of the Bill. Such purpose and prayers, plainly manifested by the Bill from beginning to end, were to hold the defendant interstate carrier lawfully and equitably accountable to its employes for its unconscientious and illegal abrogation and denial of their contractual rights of person and property created by and growing out of valid contracts entered into with them by the defendant carrier in compliance with the mandate of the Act of Congress of 1920, known as the "Transportation Act", that "*It shall be the duty* of all carriers, their officers and employes to *exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier* growing out of any dispute between the carrier and the employes thereof."

Further, with respect to this subject, it is respectfully submitted on behalf of the Petitioners that the circumstance that the Decision of the Labor Board may not be enforced by court decree or process has no relation to or effect upon the purposes, and the prayers for relief, set forth in the Bill of Complaint, which are based upon the valid operation of the Transportation Act in prescribing the duties of and relations between interstate carriers and their Employes, and embodied in the Contracts entered into and put in operation by such carriers and their employes pursuant to the provisions and purposes of the Act.

Finally, upon this point, the Decisions of the Supreme Court of the United States in the *Pennsylvania Railroad Cases,* reported in 261 U. S. 72 and in 267 U. S. 203, holding that the *decisions* of the Railroad Labor Board, rendered in controversies and cases adjudged and determined by it, were not enforceable by the process of the Courts, did not hold, and the Supreme Court has never held, that *Contracts* entered into, and carried into operation, by interstate carriers and their employes, in obedience to the Transportation Act, were not enforceable. To hold that decisions by the Labor Board of controversies submitted to it are not enforceable in the Courts is a totally different thing from holding that Contracts actually made and given operation by the parties to them, under and by virtue of the *federal Act,* are not enforceable in the federal Courts.

As appears on page 213 of the Report of the Case in 267 U. S., *all* the Court held in both cases, namely, in the first case in 261 U. S. 72, as well as in the second case, 267 U. S. 203, was:

> "It is evident from a review of title III of the Transportation Act of 1920 that *Congress deems it of the highest public interest* to prevent the interruption of

interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first, by conference between the parties; failing that by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the carrier group, the labor group, and the public. *The decisions of the Labor Board are not to be enforced by process.* The only sanction of *its decision* is to be the force of public opinion invoked by the fairness of a full hearing, *the intrinsic justice of the conclusion, strengthened by the official prestige of the board, and the full publication of the violation of such decision by any party to the proceeding.* The evident thought of Congress in these provisions is that the *economic interest of every member of the public in the undisturbed flow of interstate commerce, and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy, and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.*"

Point IV.

THE QUESTION WHETHER OR NOT THE EQUITABLE DOCTRINE OF LACHES SHOULD BE APPLIED IS, IT IS RESPECTFULLY SUBMITTED, DECISIVELY ANSWERED IN THE NEGATIVE BY THE ALLEGATIONS OF THE BILL AND THE SETTLED AND FAMILIAR PRINCIPLES THAT LACHES MAY NOT BE AVAILED OF BY DEFENDANTS WHO ARE CULPABLE, AS THE BILL HEREIN CHARGES, OF ILLEGAL, UNCONSCIONABLE AND UNMORAL CONDUCT, WHEREBY THEY HAVE DEPRIVED A PLAINTIFF OF HIS RIGHTS AND IMPOSED UPON HIM CONTINUING DEPRIVATIONS, INJURIES AND LOSSES, AND ACTED IN A MANNER OBNOXIOUS TO ETHICAL AND EQUITABLE PRINCIPLES. UPON THAT FIRMLY SETTLED PRINCIPLE, THE ADMITTED CASE MADE BY THE BILL WITH RESPECT TO THE MISCONDUCT OF THE DEFENDANT PRECLUDES IT FROM AVAILING OF THE EQUITABLE BAR OF LACHES.

In view of the censurable and inequitable conduct of the Defendant, alleged in the Bill and Exhibit and admitted upon the Motion to Dismiss, whereby the wrongs and injuries complained of were inflicted upon the Plaintiffs, the equitable defense of laches will not be permitted to the wrongdoer guilty of such conduct.

In *Judge Phelps' Juridical Equity*, Sec. 262, Laches, at pp. 355-356, it is said:

> "Laches may be called the typical equitable doctrine, for several reasons. In the first place, there is nothing arbitrary or technical in its rules, which *rest upon the plainest principles of substantial justice and public policy.* Again, these rules are all subject to the sound discretion of the court, *to be freely exercised in view of the special circumstances of each case, or, in other words, every case, as to laches, is governed chiefly by its own circumstances.* And, lastly, it runs through *the whole system* to such an extent that to cite its applications would be to enumerate nearly all the enabling doctrines of equity."

In *Story's Equity Jurisprudence,* Vol. 3, Sec. 1974, 14th ed., it is stated that Courts of Equity "also interfere in many cases to *prevent the bar of the Statutes (of Limitations) where it would be inequitable or unjust.* Thus for example if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, *Courts of Equity will interpose and remove the bar out of the way of the other injured party.* A FORTIORI THEY WILL NOT ALLOW SUCH A BAR *to prevail, by mere analogy, in suits in equity,* WHERE IT WOULD BE IN FURTHERANCE OF A MANIFEST INJUSTICE".

In support of this doctrine, the elaborate exposition of it by Lord Redesdale in the case of *Bond v. Hopkins,* 1 Sch. & Lefr. 430-435, is cited in an extensive note.

Where there is continuing wrong or fraud or unconscionable conduct upon the part of the defendant, "the Court will look with much indulgence upon the circumstances tending to excuse the Plaintiff from a prompt assertion of his rights."

Bispham's Principles of Equity, Sec. 203, p. 345
citing:
Saxlehner v. Eisner & Mendelson Co., 179 U. S. 39.
McIntire v. Pryor, 173 U. S. 38.
McLean v. Fleming, 96 U. S. 245.
Menendez v. Holt, 128 U. S. 514.

In 21 *Corpus Juris, Equity,* Section 223, pp. 229-230, it is said:

> "Nor does mere submission to an injury necessarily constitute acquiescence, where the wrong is continuing in its nature, at all events if there is an element of fraud in the case; *it is not for a wrongdoer to impose extreme vigilence and promptitude as conditions to the exercise of the right of the person injured.* * * *

The law does not demand the utmost exertion of diligence in repelling a hostile invasion of one's rights deliberately undertaken with full knowledge of all the facts."

In the same Work, same Title, Section 230, p. 237, it is also said:

"Lapse of time will not bar relief where circumstances exist which excuse the delay and *render it inequitable to interpose the bar.* There is no obsolute rule as to what constitutes an excuse for an apparently unreasonable delay. *It depends on the circumstances of the particular case and rests in the sound discretion of the Chancellor."*

In *Michoud v. Girod,* 4 Howard 503; 11 L. Ed. 1077, at p. 1102, the Supreme Court, in that elaborately considered case, referring to the equitable doctrine of laches, said:

"There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe *no case* can be found in the books in which a court of equity has refused *to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."*

A Court of Equity applies the rule of laches according to its own ideas of right and justice, every case being governed by its own circumstances.

Brown v. Buena Vista Co., 95 U. S. 157; 24 L. Ed. 422.
Patterson v. Hewitt, 195 U. S. 309; 49 L. Ed. 214.

Equity will *refuse* to adopt a rule of limitations *where injustice would result.*

Rhode Island v. Massachusetts, 15 Peters 233; 10 L. Ed. 721.

And see the Opinion of the late Mr. Justice Van Devanter, as Circuit Judge, in *Stevens v. Grand Cent. Mining Co.*, 133 Fed. 32; and particularly page 33.

A suit begun in 1914, *to enforce provisions of the Sherman Anti-Trust Act of 1890, against unlawful control by the Southern Pacific Company* of the Central Pacific system, acquired in 1899, is not barred because not begun earlier, even if delay could bar the Government in such a case.

U. S. v. So. P. Co., 259 U. S. 214; 66 L. Ed. 907.

The equitable doctrine of laches cannot be invoked to bar rights of Indians in lands purchased in violation of the provisions of U. S. Rev. Stat. Sec. 2078, that no person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States.

Ewert v. Bluejacket, 259 U. S. 129; 66 L. Ed. 858.

See also the same principle applied in favor of Homestead Claimants under Act of February 8, 1887, 24 Stat. at L. 391, ch. 120.

U. S. v. New Orleans P. R. Co., 248 U. S. 507; 63 L. Ed. 388.

And see

Hirons v. Hubbell, 149 Md. 593; 607.
10 Rul. Case Law, 404, sec. 151.

POINT V.

Inasmuch as the Circuit Court of Appeals did not sustain the objections, made by the Defendant in its Motion to Dismiss the Bill of Complaint, of unenforceability, non-mutuality, etc. of the Contracts entered into by the defendant Company and the plaintiff Employes, this Brief will not be prolonged by discussion of that subject.

CONCLUSION.

The Bill of Complaint and the Exhibit filed with it show that the plaintiff Employes, the Petitioners here, have been most seriously wronged and injured by the defendant Carrier in violation of its "legal and moral" obligations to them, and that such wrongs and injuries were perpetrated by the Defendant by its repudiation of a Federal Statute under a claim of right upon its part, and it is respectfully submitted that those wrongs, and the Bill for their redress, call upon the Defendant to answer the complaint and charges of upwards of one thousand of its employes against it.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this honorable Court of its supervisory powers, and that to such end a Writ of Certiorari should be granted and this honorable Court should review the judgment of the Circuit Court of Appeals for the Fourth Circuit and reverse it.

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No. 383

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

LESTER H. BARNHART, CLINTON R. SMITH, GEORGE W. YONTZ, ET AL., ETC.,
Petitioners,

v.

WESTERN MARYLAND RAILWAY COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 30-42) is reported in 41 F. Supp. 898. The opinion of the circuit court of appeals (R. 47-58) is reported in 128 F. 2d 709.

JURISDICTION

The decree of the circuit court of appeals was entered on June 11, 1942 (R. 59). Petition for a writ of certiorari was filed on September 8, 1942. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a substantial controversy arising under the laws of the United States within the meaning of Section 24(1) of the Judicial Code establishing the jurisdiction of the federal district courts is shown by allegations of a complaint in which the only federal rights asserted are alleged to arise out of the provisions of Title III of the Transportation Act of 1920 and out of decisions of the Railroad Labor Board created by it, where it further appears that by decisions of this court it has been conclusively established that such statutory provisions and such Board decisions created no enforceable legal rights whatsoever.

2. Whether, in an action brought in 1941 praying injunction against continued violation of an asserted contract of employment and for an accounting based on petitioners' alleged status as employees, the complaint is properly to be dismissed for laches where it is based on an alleged wrongful discharge of petitioners in 1922 and continued violation of the contract thereafter and where it alleges no fraud, concealment or other reason excusing lack of diligence.

STATUTES INVOLVED

The Judicial Code, Section 24, 28 U. S. C., Sec. 41 provides:

> The district courts shall have original jurisdiction as follows:
>
> (1) First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *

STATEMENT

Complaint was filed June 27, 1941, in the United States Court for the District of Maryland on behalf of seven named plaintiffs and approximately 1,200 other alleged employees of the respondent, Western Maryland Railway Company. The action, in the nature of a class suit, prayed judgment for (1) an injunction against respondent's continuing to treat the plaintiffs as no longer employees and continuing to deprive them of wages, earnings, rights, privileges and property as such; and (2) an accounting for loss and denial of wages, earnings, rights and other claims as employees appurtenant to their alleged status as employees from March 16, 1922, to date (R. 2-16).

The respondent filed a motion to dismiss on the grounds, among others, that the court had no jurisdiction and that the claims of the plaintiffs are barred by the statute of limitations and by laches (R. 29-30).

The district court dismissed on the ground that the complaint failed to raise a federal question and that the action was barred by limitations and laches (R. 30-42). The circuit court of appeals, viewing the action as in the nature of a suit in equity, affirmed on the ground that there was nothing in the complaint to establish federal court jurisdiction and that the claim was in any event barred by laches (R. 47, 51-57).

The pertinent allegations of the complaint may be summarized as follows:

Lester H. Barnhardt and the six other named plaintiffs constitute a committee representing and acting for Federated Shop Craft Employes, Maintenance of Way Employes, and Signalmen Employes, of the Western Maryland Railway Company, numbering some 1,200. They are as-

serted to be employees of the Company who have never been discharged as such "as prescribed and required by lawful agreements existing between them" and the Company. Defendant, a Maryland corporation engaged in interstate commerce, was returned to private ownership and management under the Transportation Act of 1920.[1]

Under Title III of the Act,[2] the Railroad Labor Board by Decision No. 119, April 14, 1921, extended the National Agreement Rules[3] until July 1, 1921, and ordered carriers and employees to hold conferences and agree upon as many rules as possible.

On November 29, 1921, by Addendum No. 6 to its Decision No. 222, the Board promulgated a complete set of rules "to take the place of the Rules in the National Agreement" and ordered them combined with the agreed rules so as to form a working agreement. The Company "accepted this Agreement, printed it and put it into effect" (R. 3-4).

The Company and the employees represented by the three organizations above-named also entered into contracts and agreements known as "Negotiations of Rules and Working Conditions Under Decision 119 of the United States Railway Labor Board"[4] (R. 4). Essential parts of the Contracts and Agreements were Rule 37, providing, among other things, against dismissal of employees without a fair hearing, and Rule 183 providing that should either employer or employees desire to revise the rules, "a written

[1] Act of February 28, 1920, c. 91, 41 Stat. 456.

[2] Act of February 28, 1920, c. 91, secs. 300-316, 41 Stat. 456, 469-475.

[3] These rules were established by agreement between National Labor Unions and the Director General of Railroads who operated the railroads until March 1, 1920, under authority of the Act of August 29, 1916, c. 418, 39 Stat. 619, 645.

[4] The contracts themselves are not set out or annexed to the complaint which states that copies thereof are in the possession of the Company and it will be called upon to produce them at the hearing.

statement containing proposed changes shall be given, and conference held within 30 days to arrange details necessary to negotiate to a conclusion" (R. 4-5).

The complaint further alleged (Paragraph 6) that the respondent "in violation of said Contracts and Agreements last above mentioned on March 16, 1922" discharged and dismissed the plaintiffs without having complied with Rules 37 and 183, and that the Company has since refused to permit them to perform their duties under said Contracts and has prevented them from performing the same (R. 5).

As particulars of the discharge, the complaint alleges (R. 7-8):

The Company "in violation of said Transportation Act of 1920 and of the wage and rule Decisions of the Labor Board, undertook to remove [the plaintiffs] from the jurisdiction of the Board" by letting out to private contractors the operation of its railway shops; that on March 11, 1922, the Company posted notice that effective March 16, 1922, substantially all positions in the maintenance of equipment or mechanical department would be abolished (R. 7-8).

On March 23, 1922, a committee representing plaintiffs notified each of the four private contractors that unless by March 25, 1922, they put into effect the rates prescribed by Decision No. 147 of the Board and the rules and working conditions agreed upon between the Company and the plaintiffs' committees, plus the rules and working conditions promulgated in the orders of the Board, they would strike (R. 8-9).

On March 25, 1922, substantially all of the employees involved left the service of the four contractors upon the

ground that the contracts were "to evade compliance with the provisions of the Transportation Act of 1920 and the rules and wage decisions of said Labor Board" (R. 9).

The Board took jurisdiction of the dispute. In its opinion dated November 13, 1922, Decision No. 1361,[5] the Board rejected the Company's contention that the men were no longer employees of the Company and so beyond the jurisdiction of the Board. It also overruled the Company's contention that the plaintiffs lost their right to oppose the shop contracts because they discontinued work. It held (a) that the contracts with the contractors violated the Transportation Act and Decisions of the Board; and (b) that the employes were under the jurisdiction of the Board and subject to the Transportation Act and Board decisions. It directed the Company to take up reinstatement with any applying employe (R. 9-11).

After setting out these particulars, the complaint further alleged: The Company denied the jurisdiction and authority of the Board and refused to accept and apply it. The Company continued to maintain and carry out its contracts with the four contractors and to hold and treat plaintiffs as no longer employees entitled to all their various rights "under and by virtue of the contracts and agreements". Although the plaintiffs called off the strike, the Company continued to refuse to give effect to its Contracts and Agreements of employment and the decisions of the Board or to the rights of plaintiffs thereunder (R. 11-12).

On February 1, 1934, the Co-ordinator of Railroads of the United States ordered the contracts of the Company with the Contractors abolished as improper, wrongful and il-

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[5] The decision of the Board is set out at length as an exhibit to the complaint (R. 16-29).

legal and they were accordingly abrogated and terminated (R. 12).

In 1934, the plaintiffs submitted the dispute to Division No. 2 of the Railway Adjustment Board at Chicago, but it decided it had no jurisdiction.[6] In 1935, upon inquiry by L. H. Barnhardt, the National Mediation Board disclaimed jurisdiction.[7] In 1940 a similar inquiry addressed to the National Labor Relations Board was forwarded to the National Mediation Board which again disclaimed jurisdiction (R. 13).

The complaint, in conclusion, alleged that the conduct of the Company has unlawfully and wrongfully denied and deprived plaintiffs of their wages and other rights and has imposed upon them irreparable injury and loss "in violation of said Contracts and Agreements between said Employes and said Railway Company and of the Decisions aforesaid of said Railroad Labor Board * * *" (R. 14).

The prayer is that the court declare that the Company has violated its "obligations and duties to the Plaintiffs * * * which arose and accrued to the Plaintiffs out and by reason of the said Contracts of employment between said Company and said Employes, and said Decisions of said Labor Board" and that plaintiffs are entitled to redress. The prayer also asks an injunction and an accounting for all losses suffered by plaintiffs as employees of the Company "from its violation of said Contracts and Agreements of employment on March 16, 1922, to the present time, and growing out of * * * their status and rights * * * as employes of said Defendant Company" (R. 15).

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[6] The National Railroad Adjustment Board was established by the Railway Labor Act, May 20, 1926, sec. 3, c. 347, 44 Stat. 577, 578, as amended by the Act of June 21, 1934, c. 691, sec. 4, 48 Stat. 1185, 1189.

[7] The National Mediation Board was established by the Railway Labor Act, May 20, 1926, sec. 4, c. 347, 44 Stat. 577 as amended by the Act of June 21, 1934, c. 691, §4, 48 Stat. 1185, 1193, 45 U. S. C. sec. 154.

The decisions of the courts below.—The district court pointed out that this Court has conclusively held that the Transportation Act and Board decisions under it create no legal rights. On that ground, it held that the complaint fails to show a substantial controversy arising under the Constitution or laws of the United States (28 U. S. C. Sec. 41(1)). No other basis for jurisdiction having been suggested, it concluded that the court was without jurisdiction (R. 30, 34-39). As another and independent ground for dismissal, the court, after raising a doubt as to the enforceability of the alleged contract of employment (R. 39-41), concluded that, in any event, whether viewed in the nature of an action at law or a suit in equity, the action was also barred by limitations and laches (R. 41-42). The circuit court of appeals affirmed on the grounds that the complaint failed to show jurisdiction (R. 47, 51-56) and that the action was barred by laches (R. 56-57, 58). It entered a decree accordingly (R. 59).

ARGUMENT

The petition discloses no special or important reason recognized by this Court as a proper occasion for the allowance of the writ of certiorari. There is no conflict with decisions of this Court or of other circuits. The applicable law, established by the numerous and uniform decisions of this Court, has been recognized and been given full effect by the courts below (R. 38, 53-54).

The complaint permits only of the conclusion that it was properly dismissed as involving no controversy arising under Federal law, and as well on the separate ground of laches.

A. THE FAILURE OF PETITIONERS' COMPLAINT TO ALLEGE A SUBSTANTIAL FEDERAL QUESTION REQUIRES THAT IT BE DISMISSED.

The complaint contains no allegations of diversity of citizenship and federal jurisdiction must be sustained, if at all, upon the ground asserted in the Petition (p. 11) that within the meaning of Section 24(1) of the Judicial Code the complaint discloses a suit in equity in which the matter in controversy arises under the laws of the United States. 28 U. S. C. Sec. 41(1).

The complaint fails to comply with Rule 8(a) of the Rules of Civil Procedure or with the requirement that the ground of jurisdiction be affirmatively and distinctly set forth, not by inference or argumentatively, but by positive and direct averments. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Larney,* 266 U. S. 511, 515; *Smith* v. *McCullough,* 270 U. S. 456, 459.

However, giving its allegations the most favorable interpretation possible, the complaint can only be read as relying upon rights asserted to have been created (1) by the Transportation Act or decisions of the Labor Board standing alone, or (2) by the Act or decisions of the Labor Board taken together with alleged contracts and agreements of petitioners with respondent, or (3) by such alleged contracts and agreements alone. It is unnecessary to determine which since the complaint, given any or all of these constructions, clearly fails to show a matter in controversy arising under a law of the United States.

Petitioners here contend that the averments of the complaint show rights in them by virtue of the Transportation Act and under their alleged contract with respondent. In the complaint, petitioners appear to rely largely on decisions of the Board as the basis for the asserted federal

rights (R. 7, 9-11, 14, 15), but in the Petition emphasis has been shifted from decisions of the Board to the Act itself. In addition to general references to the Transportation Act, petitioners now rely specifically (Pet. 12, 37) on Section 301 of the Transportation Act, 41 Stat. 469:

> It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means *to avoid any interruption to the operation of any carrier* growing out of any dispute between the carrier and the employees or subordinate officials thereof. (Emphasis supplied.)

Aside from an attempt to distort this into an admonition to use all reasonable effort and available means *to avoid dispute with employees* (Pet. 13), the petition, although in some places relying on the Act alone as the source of the alleged rights (Pet. 13, 34), for the most part adheres to the coupling of the Act with the contracts as a unitary source of such rights (Pet. 12, 23, 31, 38).[8]

This transparent device, which also appears in the complaint (R. 4, 14, 15) and in the Exhibit (R. 23-24) upon which the petition in part relies (Pet. 17-19), cannot conceal the fact that no substantial federal right is here involved.

It is conclusively established by decisions of this Court that the Transportation Act or Board decisions under it created no rights in either employer or employees.—This Court has twice ruled that no rights accrued to either employer or employees by virtue of the Transportation Act

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[8] Statements in petitioners' argument that respondent claimed a right under the Transportation Act to repudiate it (Pet. 12, 13, 32) are apparently directed to showing that the complaint alleged a right under federal law asserted as a defense by respondent. The answer is that such allegations beyond, and unnecessary to, the statement of the cause of action cannot be made the basis of jurisdiction. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 640; *Joy* v. *St. Louis*, 201 U. S. 332, 341; *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113.

of 1920 or as a result of decisions of the Railroad Labor Board created by it. In *Pennsylvania R. R.* v. *Labor Board,* 261 U. S. 72, upholding dismissal of a bill by the railroad to enjoin publication of the Board's findings, this Court said (p. 79):

> The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding.

In *Pennsylvania Federation* v. *Pennsylvania R. R. Co.,* 267 U. S. 203, this Court dealt with a subsequent suit by a union of employees of the same company to enjoin what was charged to be a conspiracy on the part of the railroad to defeat the provisions of the Transportation Act of 1920 and to deprive the employees of the rights with which the provisions of Title III of the Act intended to vest them. Affirming the dismissal of the bill, this Court quoted from its decision in the previous litigation and unequivocally held (p. 215):

> It is clear from this language that in the *Labor Board Case* this Court has decided that there is nothing compulsory in the provisions of the statute as against either the Company or the employees upon the basis of which either acquired additional rights against the other which can be enforced in a court of law.
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> * * * * * *
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> [p. 216] But when the other sections of the Title are taken as a whole, they may be searched through in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated were in any way to be forced into compliance *with the statute* or *with the judgments pro-*

nounced by the Labor Board, except through the effect of adverse public opinion. [Emphasis supplied.]

* * * * * *

[p. 217] The Pennsylvania Company is using every endeavor to avoid compliance with the judgment and principles of the Labor Board * * * it is, so far as its dealings with its employees go, refusing to comply with the decisions of the Labor Board and is thus defeating the purpose of Congress. * * * All these things it might do and remain within its strict legal rights after it came fully into control of its railroad property subsequent to September 1, 1920. We do not think Congress, while it would deprecate such action, intended to make it criminal or legally actionable.

It is thus finally settled that petitioners have at no time had and do not now have either by virtue of the Transportation Act of 1920 or under decisions of the Labor Board created by it any right, privilege or immunity cognizable or enforceable in any court of law. *Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks,* 281 U. S. 548, 560-562; *Virginian Ry.* v. *Federation,* 300 U. S. 515, 542.

Because the only rights under a federal law asserted by the complaint have been held conclusively to be non-existent, the suit involves no substantial federal question and was properly dismissed.—Regard for the legislative policy reflected in the statute conferring jurisdiction over suits arising under the laws of the United States requires that the federal courts confine their own jurisdiction to the limits defined by the statute. *Gully* v. *First Nat. Bank,* 299 U. S. 109, 114. Cf. *Healy* v. *Ratta,* 292 U. S. 263, 269-270; *Shamrock Oil Co.* v. *Sheets,* 313 U. S. 100, 108-109. And the complaint must allege facts showing a federal question not in mere form, but in substance. *Cuyahoga Co.* v. *Northern Ohio Co.,* 252 U. S. 388, 397.

Therefore, where as here, the unsoundness of the asserted federal question "so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy", the complaint must be dismissed. *Western Un. Tel. Co.* v. *Ann Arbor R'd Co.*, 178 U. S. 239, 244; *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, 105-106; *Ex parte Poresky*, 290 U. S. 30, 31-32.

Any rights alleged in the complaint arise under state law and controversy with respect thereto does not arise under a law of the United States.—Point II of petitioners' argument (Pet. 34) requires but brief attention. It may be conceded, arguendo at least, that repeal of the Transportation Act did not divest or destroy personal and property rights which petitioners assert were "created and subsisting by virtue of that Act" and "came into existence and became vested by virtue of the provisions of that Federal Statute". The answer is that, as this Court has held, the Act created no legal rights. It was, therefore, unnecessary for the courts below to hold that the repeal of the Act destroyed such rights and they plainly did not do so.

In Point III petitioners appear to rely on allegations in their complaint that respondent entered into contracts and agreements with them (R. 4-5) and that respondent violated the obligations of these contracts. And they contend that allegations of the complaint aver rights and duties under "contracts actually made and given operation by the parties to them, under and by virtue of the *federal Act* (Pet. 38) or "pursuant to the provisions and purposes of the Act" (Pet. 38) or, as alternatively stated, rights "directly referable now to federal Act of 1920 and the Contracts which created them under the authority and provisions of that Act" (Pet. 23).

It is unnecessary to argue whether the complaint is capable of this interpretation. Allegations that rights have their origin in a federal statute are insufficient. *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, 507; *Gully* v. *First Nat. Bank*, 299 U. S. 109, 114.

Furthermore, it is plainly irrelevant here whether such contracts have their origin in, or even include in terms or by reference, provisions of the Transportation Act or of Board Decisions. For the decisive factor is the non-federal nature of the right here asserted. *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. It having been decided by this Court that the Act and decisions of the Board created no legally enforceable obligations, suit obviously can be maintained, if at all, not by virtue of the Act of Congress, but only by virtue of Maryland law; inquiry along Federal lines would be only incidental to a determination of the local question of what the agreement of the parties is and of what, under the sanctions of state law, they will be held obligated to do. *Miller's Executors* v. *Swann*, 150 U. S. 132, 136-137; *Louisville & Nash. R. R. Co.* v. *Western Un. Tel. Co.*, 237 U. S. 300, 303; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85; *Teague* v. *Brotherhood of Locomotive Firemen*, 127 F. 2d 53, 55 (C. C. A. 6). Since this suit is necessarily built upon alleged contracts which in point of obligation must have their genesis in the law of Maryland and of that State alone, and since "a suit arises under the law that creates the cause of action", it must be concluded that, as the court below held (R. 55), the instant case does not arise under any statute of the United States so as to confer jurisdiction on the United States District Court. *Gully* v. *First Nat. Bank*, 299 U. S. 109, 114; *American Well Works* v. *Layne*, 241 U. S. 257, 260.

B. THE PREJUDICIAL AND UNEXPLAINED DELAY OF 19 YEARS IN BRINGING SUIT REQUIRES THAT THE SUIT BE DISMISSED FOR LACHES.

The bar of laches is upheld by the circuit court of appeals on two grounds: First, whether this be regarded as a case of concurrent or of exclusive equity jurisdiction, since the Maryland courts apply the local three-year statute of limitations[9] in both types of suits (*Wilhelm* v. *Caylor*, 32 Md. 151, 157; see *Jones* v. *Burgess*, 176 Md. 270), the period of that statute is properly to be applied in the federal courts where as here the suit is analogous to an action of account. *Russell* v. *Todd*, 309 U. S. 280, 289, 293. But the holding of laches does not rest on that ground alone. The court also held that, without reference to the state statute, the suit is barred under the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant. *Wagner* v. *Baird*, 7 How. 234, 258; *Speidel* v. *Henrici*, 120 U. S. 377, 387; *Russell* v. *Todd*, 309 U. S. 280, 287, 289.

Petitioners have failed in any way to meet the point that no explanation, much less an excuse, has been offered for their obviously prejudicial delay of 19 years in bringing suit.[10] They show no conflict with the authorities upon which the decision rests and they further admit (Pet. 42):

> A Court of Equity applies the rule of laches according to its own ideas of right and justice, every case being governed by its own circumstances.

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[9] 2 Maryland Annotated Code (Flack 1939), Art. 57, sec. 1, p. 2456, provides:

> "All actions of account, actions of *assumpsit*, or on the case * * *, actions of debt on simple contract, detinue or replevin, all accounts for trespass for injuries to real or personal property * * * shall be commenced, sued or issued within three years from the time the cause of action accrued * * *."

[10] Pertinent to petitioners' assertion of "censurable and inequitable" conduct by respondent (Pet. 40) is the fact, pointed out by the courts below that in a suit against respondent by other employees on essentially the same facts and theory, the Circuit Court for Baltimore County in 1926 held that respondent was not bound by any enforceable contract of employment by virtue of the alleged agreements entered into in pursuance of decisions of the Labor Board (R. 40-41, 58).

None of the decisions cited by petitioners are in point.—There has been no fraud, concealment, unconscionable conduct or continuing affirmative wrong such as were the bases of the decisions on which petitioners rely (Pet. 41-42). Nor are the facts here at all comparable with the other cases cited by petitioners (Pet. 43).

Here two courts and four judges, after obviously careful consideration of the circumstances have concurred in the view that it would be contrary to equity and justice to permit the petitioners, after almost two decades of inaction, to force upon respondent the radically increased burden of defending such a suit.

> The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. (*Brown* v. *County of Buena Vista*, 95 U. S. 157, 161)

CONCLUSION

The decision of the circuit court of appeals is correct and presents neither a conflict of decision nor a question of substance or general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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